

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 17, 2003

v

DEMARIO LADALE RAY HOLMES,

Defendant-Appellant.

No. 236870
Saginaw Circuit Court
LC No. 00-019383-FC

Before: Neff, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant Demario Ladale Ray Holmes appeals as of right his jury trial conviction of three counts of assault with intent to murder, MCL 750.83, two counts of felony-firearm, MCL 750.227b, carrying a concealed weapon (CCW), MCL 750.227, and intentionally discharging a firearm from a motor vehicle, MCL 750.234a. Defendant was sentenced to 18¾ to 35 years' imprisonment for each count of assault with intent to murder, two to four years' imprisonment for intentionally discharging a firearm from a motor vehicle, two to five years' imprisonment for CCW, and two years' imprisonment for two counts of felony-firearm. We affirm defendant's convictions, but remand for correction of the judgment of sentence.

I

The charges in this case arose out of a shooting incident that took place in the middle of the day at a busy gas station. Defendant drove through the gas station in a distinctive green Mustang and fired at least four and perhaps as many as six shots from a pistol in the direction of two men who were at the station to get gas. While neither was hit, a third man at his own car filling a gas can was struck, perhaps by debris from something one of the bullets hit. In addition, the car was hit in several places and the driver's side door window was shattered.

Only one of the three victims of the assault could identify defendant as the shooter; the other two were ducking to avoid injury. He testified unequivocally at the preliminary examination that he knew and recognized defendant when defendant drove through the gas station. He identified the car and testified that defendant shot at him with a black handgun. At trial, this witness claimed to have no memory of the incident and his preliminary examination testimony was read to the jury.

When defendant was arrested a short time later, a black handgun was retrieved from near where he was sitting and it was later linked to the shooting by expert testimony. Other evidence linked defendant to the shooting and on appeal he does not dispute that he was the shooter, only that the prosecution did not prove the necessary intent to support the assault convictions.

II

Defendant's first issue on appeal is that insufficient evidence was presented to support defendant's three assault with intent to commit murder convictions. We disagree. Review of the sufficiency of the evidence in a criminal case is de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing a claim of insufficient evidence, the evidence is viewed in the light most favorable to the prosecutor to determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003).

The offense of assault with intent to commit murder is a specific intent crime. *People v Lipps*, 167 Mich App 99, 105; 421 NW2d 586 (1988). The elements of assault with intent to commit murder are: (1) an assault; (2) with an actual intent to kill; (3) which, if successful, would make the killing murder. The intent to kill may be proven by inference from any facts in evidence, and the intent may exist without directing it at any particular victim. *People v Abraham* 234 Mich App 640, 657-658; 599 NW2d 736 (1999). "[I]t is not enough that the defendant acted only with an intent to cause serious bodily injury or with a conscious disregard of the risk of death." *Lipps*, *supra* at 105.

"Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Here the evidence was far more than minimal. Defendant fired a gun multiple times at close range at persons and a car at a gas station. There were two men in the car and numerous other people in the area at the gas pumps. Bullets hit the car, and one of the bullets appeared to have been aimed at the driver's side and another appeared to have been aimed at the passenger's side. This circumstantial evidence and reasonable inferences drawn from it are sufficient to prove the intent element of assault with intent to commit murder. *People v Whitehead*, 238 Mich App 1, 14-15; 604 NW2d 737 (1999).

III

Defendant next argues that the trial court improperly held a witness¹ was unavailable and therefore, improperly admitted the witness' prior record testimony. We disagree. The decision to admit or exclude evidence is within the trial court's discretion." *McRunels*, *supra* at 183.

¹ This was the witness who identified defendant as the shooter at the preliminary examination.

After the witness testified at trial that he could not recall the shooting, the trial court questioned him. The trial court then determined the witness' preliminary examination testimony could be admitted under MRE 804(b)(1). MRE 804(a)(3) allows a witness to be considered unavailable because of the witness' lack of memory. *People v Williams*, 117 Mich App 505, 510; 324 NW2d 70 (1982). "Prior recorded testimony of a witness is considered trustworthy because the witness testified under oath and the opponent had a fair opportunity and proper motive to examine the witness at the earlier proceeding." *People v Hayward*, 127 Mich App 50, 56; 338 NW2d 549 (1983). In *People v Edgar*, 113 Mich App 528, 536; 317 NW2d 675 (1982), this Court stated that the victim was unavailable for trial whether her memory failure was due to a fear of the defendant or an honest lack of recall. Therefore, the victim's prior preliminary examination testimony was admissible under MRE 804(b)(1). *Id.*

In this case, the witness was extensively cross-examined during the preliminary examination. While the prosecutor did not try to refresh the witness' memory at trial with his preliminary examination testimony, the witness adamantly stated numerous times that he did not remember the events. The witness' professed lack of memory brought his preliminary examination testimony within the scope of the hearsay exception of MRE 804(a)(3) and MRE 804(b)(1). *Edgar, supra* at 536.

IV

Defendant argues that the trial court erred when it denied defendant's challenge to offense variable (OV) 3.² We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* Applying the sentencing guidelines is a legal question reviewed de novo. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002).

OV 3 relates to physical injury to a victim, and OV 3 was scored at 10 points for defendant. Michigan Sentencing Guidelines Manual, 2001 ed, 29. Ten points are scored if "[b]odily injury requiring medical treatment occurred to a victim[.]" and five points are scored if "[b]odily injury not requiring medical treatment occurred to a victim[.]" *Id.* The instructions indicate, "'Requiring medical treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." *Id.*

² This sentence is controlled by the legislative guidelines, MCL 769.31 *et seq.*, because the charged offenses occurred on November 1, 2000. The legislative sentencing guidelines, rather than the Supreme Court's sentencing guidelines, apply to offenses committed on or after January 1, 1999. MCL 769.34(1).

OV 3 was properly scored. A picture was taken of the wound on the victim's leg, and he testified that emergency medical personnel looked at the wound and made suggestions on how to treat it. The victim did not know what had caused the wound; however, he had been in close proximity to an area where multiple gunshots had just been fired. There was evidence to support the trial court's determination that medical treatment of the wound was necessary, regardless of the ultimate severity of the wound. See *Hornsby*, *supra* at 468.

V

Defendant's final two arguments deal with consecutive sentencing as it relates to the two felony-firearm convictions. The circuit court information charged defendant with felony-firearm in relation to the three counts of assault with intent to murder and in relation to the count of discharge of a firearm from a vehicle. The jury convicted on the two counts of felony-firearm, but it is not entirely clear from the record which of the relevant predicate felonies the felony-firearm convictions related to.

At sentencing the trial judge first ruled that the two felony-firearm sentences of two years each would run concurrently to each other and consecutively to the assault with intent to commit murder sentences, treating the latter as the predicate felonies for both felony-firearm convictions. However, the court later said in response to a question from defense counsel that all of the sentences would be concurrent "except for the felony-firearm which will precede and be consecutive to the others" [emphasis added]. The judgment of sentence reflects the trial court's latter statement that presumably includes all three assault convictions, the discharge from a vehicle conviction and the CCW conviction. This was error, but it will have no effect on the amount of time defendant will be required to serve and requires only remand for the ministerial act of correcting the judgment of sentence.

Sentencing decisions are within the trial court's discretion and reviewed for an abuse of discretion. *People v Gonzalez*, 256 Mich App 212, 227; 663 NW2d 499 (2003). A sentence for felony-firearm must be served before any term of imprisonment imposed for the predicate felony. *People v Bonham*, 182 Mich App 130, 137; 451 NW2d 530 (1989). A felony-firearm sentence must be served consecutively only to the sentence for the specific underlying predicate felony. *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000). The statute does not permit "consecutive sentencing with convictions other than the predicate offense." *Id.* at 464.

"Since a CCW conviction may not be the underlying felony for a felony-firearm conviction, . . . there is no statutory authority for imposing a CCW sentence to be served consecutive to a felony-firearm sentence."³ *Id.*; see also MCL 750.227b. The trial court also ruled that the two felony-firearm sentences would be consecutive to the three assault sentences. However, the order in which the verdict was delivered by the jury (as reflected by the transcript), while not entirely clear, strongly suggests that it assigned one felony-firearm conviction to the

³ The prosecutor concedes this point in its brief filed shortly before oral argument.

three assault convictions (as predicate felony) and one to the discharge of a firearm from a vehicle (as the other predicate felony) as charged in the information and the court's instructions.

Defendant's convictions are affirmed. We remand for the ministerial task of correcting the judgment of sentence to reflect that one felony-firearm sentence is to run consecutively to one of the assault with intent to murder sentences, and the other felony-firearm sentence is to run consecutively to the discharge of a firearm from a vehicle sentence, the two felony-firearm sentences to run concurrently to each other and neither to run consecutively to the CCW sentence. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Karen M. Fort Hood

/s/ Stephen L. Borrello